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## THE FOX GUARDING THE HENHOUSE: *NEWMAN v. KING COUNTY* AND WASHINGTON'S FREEDOM OF INFORMATION LAW

Julia E. Markley

*Abstract:* In its 1997 decision *Newman v. King County*, the Supreme Court of Washington created a categorical exemption for open police files under the Public Disclosure Act (PDA). The court reasoned that if a police file was open, its confidentiality was necessarily "essential for effective law enforcement," and thus came within an exemption from disclosure. As a result of the court's decision, law enforcement agencies need only assert that an investigation is active in order for the public record to be exempt. This Note argues that the majority's broad and abstract opinion is contrary to the law and facts of *Newman*. Rather, the dissent correctly applied the Act's plain language requiring a court to analyze whether an individual record actually comes within an exemption.

*Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties.*<sup>1</sup>

John Milton

Our nation's civil rights movement exploded in the 1960s. The Montgomery bus boycott, lunch counter sit-ins, police firehose brutality, and stirring speeches of Dr. Martin Luther King, Jr. were images every American watched on the nightly news. Today, history books document the great civil rights leaders slain: Dr. King, Malcolm X, and Medgar Evers. National Black leaders were not the only targets; Edwin T. Pratt, a Black civil rights leader in Seattle, Washington was killed on January 26, 1969 while standing in the doorway of his West Seattle home.<sup>2</sup> Neither local police nor the FBI ever found Pratt's assailant.<sup>3</sup>

Twenty-five years later, in March 1994, a freelance journalist requested that the King County Department of Public Safety provide him access to the Edwin Pratt murder file pursuant to the Washington Public Disclosure Act (PDA).<sup>4</sup> The PDA requires public agencies to make available for public inspection and copying all public records, unless the

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1. John Milton, *Areopagitica*, in *Complete Poems and Major Prose* 716, 746 (Merritt Y. Hughes ed., Odyssey Press 1957).

2. Pratt, *Urban League Director, Shot, Killed*, Seattle Post-Intelligencer, Jan. 27, 1969, at A.

3. *Newman v. King County*, 133 Wash. 2d 565, 568, 947 P.2d 712, 713 (1997).

4. *Id.*

record falls within a specific exemption of the Act.<sup>5</sup> The Department denied the journalist's request almost entirely; it released only a heavily redacted initial incident report.<sup>6</sup> The Department claimed the murder file fell within the statutory exemption protecting records "essential to effective law enforcement."<sup>7</sup>

The dissatisfied journalist, David Newman, brought suit seeking a declaratory judgment entitling him to statutory damages because the Department had violated the PDA.<sup>8</sup> Upon Newman's motion for summary judgment, the trial court ruled that the files were not entitled to a blanket exemption from disclosure.<sup>9</sup> The Supreme Court of Washington reversed, holding that the PDA categorically exempts from disclosure all information contained in an open, active police investigation file.<sup>10</sup>

This Note argues that *Newman's* categorical exemption for all open law enforcement files—with no further analysis of whether the nondisclosure of the information sought is essential for effective law enforcement—is contrary to the language of the statute. *Newman* usurps both the constitutional protection and the legislative intent behind the PDA by removing the power of decision from the courts. Instead, *Newman* gives Washington's law enforcement agencies unchecked power to withhold information, thus opening the door for abuse.

Part I of this Note describes the federal Freedom of Information Act's (FOIA) law enforcement exemption, which informed the *Newman* court's analysis. Part II provides an overview of the pertinent part of the Washington Public Disclosure Act (PDA) and discusses the salient cases interpreting the PDA and its law enforcement exemption. Part III outlines the majority and dissenting opinions in *Newman*. Part IV argues

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5. The Washington statute provides, in pertinent part: "Each agency, in accordance with published rules, shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of [this Act]... or other statute..." Wash. Rev. Code § 42.17.260(1) (1998).

6. *Newman*, 133 Wash. 2d at 568, 947 P.2d at 713. After further review, the Department decided to release more information to Newman because it determined that such release might prompt leads helpful to investigation of the case. The incident report was re-released with much less information redacted. *Id.*, 947 P.2d at 713-14.

7. *Id.*

8. *Id.*

9. *Id.* at 569, 947 P.2d at 714.

10. *Id.* at 567-68, 947 P.2d at 714. The supreme court granted the Department's request for discretionary review. *Id.* at 570, 947 P.2d at 714.

that the categorical exemption resulting from *Newman* is inconsistent with the PDA's requirement that courts analyze whether nondisclosure is "essential to effective law enforcement." Part IV notes that federal courts conduct a more reasoned approach in deciding whether a document is exempt. Finally, Part V suggests that Washington adopt a case-by-case approach to future law enforcement exemption cases and employ a multi-factored test to determine whether nondisclosure is indeed "essential to effective law enforcement."

## I. THE FEDERAL FREEDOM OF INFORMATION ACT (FOIA)

Washington courts have looked to federal law for guidance when interpreting the PDA. *Newman* was no exception, drawing upon the federal courts' analysis of the FOIA's law enforcement exemption (Exemption 7A).<sup>11</sup> Like the PDA, the FOIA mandates liberal disclosure.<sup>12</sup> Under federal law, records are exempt if "the production of such law enforcement records or information could reasonably be expected to interfere with enforcement proceedings."<sup>13</sup> The federal government has the burden of demonstrating that the exemption applies.<sup>14</sup> Circuit courts have uniformly interpreted the FOIA to require a two-pronged analysis: (1) whether there is a pending or prospective investigation, and (2) whether disclosure will cause articulable harm.<sup>15</sup>

To satisfy the requirement of a pending or prospective investigation, there must be "at least a reasonable chance that an enforcement proceeding will occur."<sup>16</sup> In determining whether disclosure will cause

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11. *Id.* at 572-73, 947 P.2d at 715-16.

12. *See infra* Part IV.D.1.

13. 5 U.S.C. § 552(b)(7) (1994).

14. 5 U.S.C. § 552(a)(4)(B) (1994).

15. *See, e.g.,* *Manna v. Department of Justice*, 51 F.3d 1158, 1164 (3d Cir. 1995); *see also* *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 232 (1978) (looking at legislative history in applying Exemption 7(A) whenever concrete prospective law enforcement proceeding would be harmed by premature release of evidence).

16. *Dickerson v. Department of Justice*, 992 F.2d 1426, 1430 (6th Cir. 1993). In *Dickerson*, a newspaper requested the FBI file on Jimmy Hoffa, a union official who had mysteriously disappeared fourteen years prior to the request. *Id.* at 1427. Despite public opinion and unofficial FBI comments that Hoffa was murdered and that the perpetrator would never be found, FBI affidavits convinced the court that an investigation was ongoing. *Id.* at 1432. The affidavits submitted attested to the current resources allocated to the Hoffa case, the increased likelihood of additional witnesses coming forward with the passage of time, and that FBI criminal investigations often result in enforcement proceedings many years after the crime occurred. *Id.*; *see also* *Bevis v.*

articulable harm, the leading U.S. Supreme Court case is *NLRB v. Robbins Tire & Rubber Co.*<sup>17</sup> In that case, the Court concluded that although a recent amendment to Exemption 7(A) was designed to eliminate blanket exemptions for records found in investigatory files,<sup>18</sup> generic determinations of likely interferences could still be made.<sup>19</sup> The generic determination in *Robbins Tire*, however, was actually quite narrow: witness statements in pending NLRB proceedings were deemed likely to interfere with enforcement proceedings, and as such were exempt until at least after the NLRB hearing.<sup>20</sup>

Following *Robbins Tire*, federal circuit courts have applied a "category-of-document by category-of-document" approach.<sup>21</sup> An agency must categorize documents into relevant groups that are "sufficiently distinct to allow a court to grasp how each . . . category of

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Department of State, 801 F.2d 1386, 1389 (D.C. Cir. 1986) (requiring "concrete prospective law enforcement proceeding").

17. 437 U.S. 214. *Newman's* majority and dissenting opinions cited *Robbins Tire* for inconsistent propositions. See *infra* note 102 and accompanying text.

18. An example of a congressionally-disapproved blanket exemption is one covering all investigatory files even if an enforcement proceeding is neither imminent nor likely. *Center for Nat'l Policy Review on Race & Urban Issues v. Weinberger*, 502 F.2d 370, 372 (D.C. Cir. 1974).

19. *Robbins Tire*, 437 U.S. at 236.

20. *Id.* at 242. The Court grounded its holding in legislative history that expressly supported protecting NLRB witness statements from opposing litigants prior to the NLRB proceedings in order to prevent unfair discovery. *Id.* at 224-26.

21. See, e.g., *In re Department of Justice*, 999 F.2d 1302, 1307 (8th Cir. 1993) (dividing Jimmy Hoffa file into nine unnamed categories); *Dickerson*, 992 F.2d at 1433-34 (delineating categories such as "results of high level strategy conferences with synopses of the investigation to date," "memoranda updating FBI director on status of investigation," "documents setting forth leads to be conducted," "documents containing information received from confidential informants," "information and documents provided by local law enforcement," "interviews of third parties and cooperating witnesses," "public source information such as newspaper clippings and press releases," "public and sealed court documents," "laboratory results setting forth results of examinations," and "polygraph worksheets and reports"); *J.P. Stevens & Co. v. EEOC*, 710 F.2d 136, 142-43 (4th Cir. 1982) (delineating categories such as "correspondence between other governmental agencies and the Commission concerning the status of litigation involving the Commissioner's charge filed," "correspondence between private attorneys and the Commission pertaining to the filing of charges against the company," "correspondence between the Commission and state or city referral agencies concerning the filing of charges or referral of cases for Commission processing," "correspondence between labor organizations and the Commission concerning the processing of charges"). In *Bevis v. Department of State*, the court only accepted categories that allowed it to assess how the disclosure would interfere with enforcement proceedings, for example, "the identities of possible witnesses and informants," "reports on the location and viability of potential evidence," and "polygraph reports." 801 F.2d at 1389-90. Unacceptable to the *Bevis* court were the categories with unhelpful names: "teletypes," "airtels," and "letters." *Id.*

documents, if disclosed, would interfere with the investigation.”<sup>22</sup> A court is not required to make a specific factual finding showing that each *document* would actually interfere with enforcement proceedings; rather, if a *category* of documents would generally interfere, it is exempt.<sup>23</sup> Sufficient information in sufficient detail must be submitted to enable the court to make a reasoned, independent assessment of the claimed exemption.<sup>24</sup> Each category must allow the court to trace a “rational link between the nature of the document and the alleged likely interference.”<sup>25</sup> Most importantly, federal courts have sought to achieve a “workable balance” between the public’s right to know and the government’s need to keep some information confidential.<sup>26</sup>

## II. THE LAW ENFORCEMENT EXEMPTION IN THE WASHINGTON PUBLIC DISCLOSURE ACT

### A. *The Public Disclosure Act*

Underlying the Public Disclosure Act is the premise that public access to information concerning the workings of the government is a fundamental precondition to a free society.<sup>27</sup> To achieve the goal of public confidence in government,<sup>28</sup> the PDA keeps the government accountable by mandating disclosure of campaign finances,<sup>29</sup> lobbyist reporting,<sup>30</sup> and public records.<sup>31</sup>

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22. *Bevis*, 801 F.2d at 1389 (internal quotations omitted).

23. *Department of Justice*, 999 F.2d at 1307.

24. *Dickerson*, 992 F.2d at 1431; *accord* *Manna v. Department of Justice*, 51 F.3d 1158, 1163 (3d Cir. 1995) (requiring government to submit detailed affidavits indicating why document is exempt).

25. *Bevis*, 801 F.2d at 1389 (remanding to allow FBI to reclassify requested documents to enable it to meet its burden).

26. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989) (analyzing whether requested documents were “compiled” for law enforcement purposes).

27. Wash. Rev. Code § 42.17.010(11) (1998) provides: “That, mindful of the right of individuals to privacy and of the desirability of the efficient administration of government, full access to information concerning the conduct of government on every level must be assured as a fundamental and necessary precondition to the sound governance of a free society.” See *Amren v. City of Kalama*, 131 Wash. 2d 25, 31, 929 P.2d 389, 392 (1997) (paraphrasing statutory language).

28. See Wash. Rev. Code § 42.17.010(5) (1998) (“That public confidence in government at all levels is essential and must be promoted by all possible means.”).

29. Wash. Rev. Code §§ 42.17.030–.135 (1998).

30. Wash. Rev. Code §§ 42.17.155–.230 (1998).

31. Wash. Rev. Code §§ 42.17.250–.340 (1998).

The public records section, which was at issue in *Newman*, explicitly lays out the policy underlying that section, and requires that the section be construed in light of that policy:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. The public records subdivision of this chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.<sup>32</sup>

The instruction to construe the PDA's policy liberally and construe its exemptions narrowly is stated three times in the Act.<sup>33</sup>

The heart of the PDA's public records section is found at RCW 42.17.260(1), which mandates that "[e]ach agency . . . shall make available for public inspection and copying all public records, unless the record falls within the specific exemptions of . . . this section or other statute."<sup>34</sup> In *Newman*, the King County Department of Public Safety invoked the law enforcement exemption to shield the Pratt file. The exemption provides that the following are exempt from public inspection and copying:

[S]pecific intelligence information and specific investigative records compiled by investigative, law enforcement, and penology agencies, and state agencies vested with the responsibility to discipline members of any profession, the nondisclosure of which is essential to effective law enforcement or for the protection of any person's right to privacy.<sup>35</sup>

The *Newman* case applied this exemption to pending police investigations.<sup>36</sup>

In anticipation of controversy regarding interpretation of the exemption, the PDA provides a comprehensive system for dealing with disputes regarding the disclosure of information. Courts are granted

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32. Wash. Rev. Code § 42.17.251.

33. See Wash. Rev. Code §§ 42.17.010(11), .251 & .920 (1998).

34. Wash. Rev. Code § 42.17.260(1).

35. Wash. Rev. Code § 42.17.310(1)(d).

36. See *infra* Part III.

jurisdiction over controversies,<sup>37</sup> and are instructed to “take into account the policy of this chapter that free and open examination of public records is in the public interest, even though such examination may cause inconvenience or embarrassment.”<sup>38</sup> The agency bears the burden of proving that a record falls within any exemption.<sup>39</sup> If requested information contains both exempt and non-exempt material, the exempt material (for example, private information) may be redacted, but the remaining material must be disclosed.<sup>40</sup> Each case of deletion, however, must be fully justified in writing.<sup>41</sup> Judicial review of challenged agency actions is *de novo*, and a court may examine *in camera* the records in question.<sup>42</sup>

In addition, the PDA’s strong policy in favor of disclosure is demonstrated by the short time period within which agencies must respond to requests and the strict imposition of statutory fees and penalties awarded to requesters who were wrongfully denied access. Agencies have a duty to provide “the fullest assistance to inquirers and the most timely possible action on requests for information.”<sup>43</sup> Attorney fees are awarded to a party prevailing against an agency in court, and a court may award a penalty amount between five dollars and one hundred dollars for each day the party was denied the right to inspect a record.<sup>44</sup> Even a good faith denial, if later ruled to be wrongful, can merit the imposition of penalty fees.<sup>45</sup>

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37. See Wash. Rev. Code § 42.17.340(1) (1998).

38. Wash. Rev. Code § 42.17.340(3) (1998).

39. Upon the motion of any person having been denied an opportunity to inspect or copy a public record by an agency, the superior court in the county in which a record is maintained may require the responsible agency to show cause why it has refused to allow inspection or copying of a specific public record or class of records. The burden of proof shall be on the agency to establish that refusal to permit public inspection and copying is in accordance with a statute that exempts or prohibits disclosure in whole or in part of specific information or records.

Wash. Rev. Code § 42.17.340(1).

40. Wash. Rev. Code § 42.17.310(2) (1998); *Amren v. City of Kalama*, 131 Wash. 2d 25, 32, 929 P.2d 389, 393 (1997).

41. Wash. Rev. Code § 42.17.260(1) (1998) provides that “in each case, the justification for the deletion shall be explained fully in writing.”

42. Wash. Rev. Code § 42.17.340(3).

43. Wash. Rev. Code § 42.17.290 (1998); *see also* Wash. Rev. Code § 42.17.320 (1998) (requiring agency to respond to request within five business days and mandating agency superior to review requests within two business days of denial).

44. Wash. Rev. Code § 42.17.340(4) (1998).

45. *Amren*, 131 Wash. 2d at 36, 929 P.2d at 395.



The PDA provides broader access to information than the FOIA. First, unlike the PDA, the FOIA contains no instruction to construe its provisions broadly and its exemptions narrowly.<sup>46</sup> Second, the PDA allows the successful litigant costs and attorneys' fees, whereas the FOIA has no such provision.<sup>47</sup> Third, the language of the exemptions is different. The FOIA exempts information if disclosure would "reasonably interfere with enforcement proceedings,"<sup>48</sup> whereas the PDA exempts information if nondisclosure is "essential to effective law enforcement."<sup>49</sup> The implications of these nuances will significantly impact the outcome of a case.<sup>50</sup>

### B. *Washington Case Law Under the Public Disclosure Act*

Washington cases concerning the public records section of the PDA have sought to achieve the balance between public access to records and the government's interest in confidentiality that the statute envisioned.<sup>51</sup> Courts deciding PDA cases have explicitly reserved for the court the power of review, stating that "the most direct course to [the PDA's] devitalization" is through agency self-policing.<sup>52</sup> The PDA's strong policy in favor of disclosure resulted in some form of disclosure in almost all of the court's pre-*Newman* decisions.<sup>53</sup> In many of those cases,

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46. *Newman v. King County*, 133 Wash. 2d 565, 581, 947 P.2d 713, 710 (Alexander, J., dissenting).

47. Wash. Rev. Code § 42.17.340(3); *see also* Michael C. McClintock et al., *Washington's New Public Records Disclosure Act: Freedom of Information in Municipal Labor Law*, 11 Gonz. L. Rev. 13, 17 n.11 (suggesting Washington is attempting to be more pro-disclosure than federal government by enacting costs provision).

48. 5 U.S.C. § 552(b)(7) (1994) (emphasis added).

49. Wash. Rev. Code § 42.17.310(1)(d) (emphasis added).

50. *See infra* Part IV.

51. *See, e.g., Spokane Police Guild v. Washington State Liquor Control Bd.*, 112 Wash. 2d 30, 33-34, 769 P.2d 283, 284 (1989) (noting that PDA provides "a workable formula which encompasses, balances and appropriately protects all interests, while placing emphasis on responsible disclosure").

52. *Amren v. City of Kalama*, 131 Wash. 2d 25, 34 n.6, 929 P.2d 389, 394 n.6 (1997); *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wash. 2d 243, 270 n.17, 884 P.2d 592, 607 n.17 (1994) [*PAWS*]; *Brouillet v. Cowles Publ'g Co.*, 114 Wash. 2d 788, 794, 791 P.2d 526, 530 (1990); *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 131, 580 P.2d 246, 251 (1978), *quoted in Newman v. King County*, 133 Wash. 2d 565, 580, 947 P.2d 713, 719 (1997) (Alexander, J., dissenting).

53. *See Lindberg v. Lindberg*, 133 Wash. 2d 729, 733, 948 P.2d 805, 814 (1997) (disclosing copyrighted site and drainage engineering drawings); *Amren*, 131 Wash. 2d at 28, 929 P.2d at 391 (disclosing report on complaints against police chief); *PAWS*, 125 Wash. 2d at 254-55, 884 P.2d at 599 (disclosing University's unfunded grant proposal subject to redaction for statutory exemption for

courts also allowed an agency to withhold validly exempt information.<sup>54</sup> Cases involving the law enforcement exemption are few,<sup>55</sup> so cases speaking to other PDA exemptions provide further guidance. On the whole, PDA exemption cases place a heavy burden on the agency to argue exemption and order the agency to excise only the exempt material and to disclose the rest.

### 1. *Case Law Prior to Newman Places a Heavy Burden on Agencies to Prove Records Are Exempt from Disclosure*

Two important points are manifest in jurisprudence prior to the *Newman* decision. First, in light of the Act's strong mandate for broad disclosure, courts have required agencies to present specific and cogent evidence to meet their burden of proving that a record is exempt. Courts looked to the purpose of the exemption to see if a record actually fell within the claimed exemption. Second, upon this inquiry, courts have not automatically exempted the entire record if they found some information statutorily exempt. Instead, courts have required agencies to parse the exempt information and disclose the remainder of the record.

#### a. *The Purpose of the Claimed Exemption*

Instead of merely applying the language of a claimed exemption, courts have required agencies to prove that nondisclosure would actually reflect the purpose of the exemption.<sup>56</sup> This kind of analysis can operate

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"valuable formulae"); *Dawson v. Daly*, 120 Wash. 2d 782, 786–87, 845 P.2d 995, 998–99 (1993) (remanding to determine whether prosecutor's file on adverse expert witness is partially exempt under work product exemption); *Brouillet*, 114 Wash. 2d at 790, 791 P.2d at 526–27 (disclosing teacher certification revocations—some containing statements about sexual involvement of teachers and students—subject to redaction of child victims' names); *Spokane Police Guild*, 112 Wash. 2d at 31, 769 P.2d at 283 (disclosing liquor board's entire investigative report containing names of police officers involved in illicit party); *Hearst*, 90 Wash. 2d at 126, 580 P.2d at 248 (disclosing tax assessor's real property appraisal notes); *Tacoma Pub. Library v. Woessner*, 90 Wash. App. 205, 222–23, 951 P.2d 357, 365–66 (1998) (disclosing public library employee's names, salaries, fringe benefits, and vacation and sick leave pay). *But see* *Cowles Publ'g Co. v. State Patrol*, 109 Wash. 2d 712, 733, 748 P.2d 597, 608 (1988) (prohibiting disclosure of police internal investigation report).

54. *See, e.g., PAWS*, 125 Wash. 2d at 255, 884 P.2d at 599; *Dawson*, 120 Wash. 2d at 795, 845 P.2d at 1003; *Brouillet*, 114 Wash. 2d at 797, 791 P.2d at 532; *Hearst*, 90 Wash. 2d at 127, 580 P.2d at 249; *Woessner*, 90 Wash. App. at 212, 951 P.2d at 365–66.

55. *See, e.g., Newman*, 133 Wash. 2d 565, 947 P.2d 712; *Cowles*, 109 Wash. 2d 712, 748 P.2d 597.

56. *PAWS*, 125 Wash. 2d at 255–58, 884 P.2d at 599–600 (refusing to exempt categorically scientific grant proposal under deliberative process exemption); *Brouillet*, 114 Wash. 2d at 799, 791

as a "severe limit[]" on the scope of an exemption.<sup>57</sup> In *Hearst Corp. v. Hoppe*, the King County assessor denied a request for property tax forms in connection with a newspaper's investigation of whether the County Assessor gave special favors to his campaign contributors.<sup>58</sup> To properly claim exemption from disclosure, the assessor had to show how nondisclosure came within the purpose of the deliberative process exemption. Specifically, the agency had to establish that the documents contained discussion and were part of a policymaking process, and affirmatively show that disclosure would be injurious to the agency's deliberative function.<sup>59</sup> Because the documents contained essentially factual data and not opinions or observations, the King County assessor failed to meet its burden and disclosure was required.<sup>60</sup>

*b. Agencies Must Specify Reasons Why a Particular Record Is Exempt*

General reasons for exemption are insufficient to sustain a denial of access; an agency must convincingly point to *specific* statutory-based reasons to withhold disclosure.<sup>61</sup> In *Spokane Police Guild v. Washington State Liquor Control Board*, the issue was whether disclosure of partygoers' names in Liquor Board documents that pertained to a party held in violation of liquor law would violate privacy rights.<sup>62</sup> The court was not swayed by arguments about the potential embarrassment resulting from disclosure of a party attendee's name, and cited the PDA proposition that free and open examination of public records is in the public interest, even though such examination may cause "inconvenience or embarrassment."<sup>63</sup> The court also dismissed arguments that the names

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P.2d at 532 (holding that information regarding revocation of teachers' certificates does not fall within intra-agency memorandum exemption because requested information is not part of policymaking process); *Hearst*, 90 Wash. 2d at 133, 580 P.2d at 252 (stating that "purpose of exemption severely limits its scope").

57. *PAWS*, 125 Wash. 2d at 245, 884 P.2d at 599 (quoting *Hearst*, 90 Wash. 2d at 133, 580 P.2d at 252).

58. 90 Wash. 2d at 134, 580 P.2d at 252.

59. *Id.*

60. *Id.*

61. See, e.g., *Brouillet v. Cowles Publ'g Co.*, 114 Wash. 2d 788, 800, 791 P.2d 526, 533 (1990) ("The language of the statute does not authorize us to imply exemptions but only allows specific exemptions to stand.").

62. 112 Wash. 2d 30, 38-40, 769 P.2d 283, 286-88 (1989).

63. *Id.* at 38, 769 P.2d at 287 (quoting Wash. Rev. Code § 42.17.340(3)). The privacy interest is only violated if disclosure would be "highly offensive to a reasonable person" and the information "is not of legitimate concern to the public." Wash. Rev. Code § 42.17.255 (1998). The *Spokane* court

of attendees should not be disclosed because the Liquor Board had promised the attendees confidentiality in exchange for their statements.<sup>64</sup>

A case where the Supreme Court of Washington held nondisclosure is warranted aptly illustrates the quantum of proof necessary for such a holding. In *Cowles Publishing Co. v. State* the law enforcement exemption was invoked.<sup>65</sup> The court in *Cowles* ruled that the names of law enforcement officers against whom complaints had been sustained after internal investigations need not be disclosed.<sup>66</sup> The agencies redacted the names relying on RCW 42.17.310(1)(d), the law enforcement and privacy exemption, on the grounds that the deletions were necessary (1) to protect privacy rights of persons named in the documents, (2) to insure effective internal affairs investigations, and (3) to insure confidentiality in the complaint reporting system.<sup>67</sup>

The *Cowles* court demanded ample proof before holding the information exempt from disclosure under the law enforcement exemption. The court noted that when a complaint is made against an officer, the officer charged is required to testify before his internal affairs division with the understanding that his testimony cannot be used in a criminal investigation.<sup>68</sup> Furthermore, fellow officers who testify are promised confidentiality.<sup>69</sup> Because internal investigation departments depend on voluntary cooperation, disclosure of names would seriously inhibit people from coming forward.<sup>70</sup> The law enforcement agencies

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ruled that a party with forty guests does not concern intimate details of one's personal and private life to implicate the right to privacy. *Spokane Police Guild*, 112 Wash. 2d at 38, 769 P.2d at 286.

64. *Spokane Police Guild*, 112 Wash. 2d. at 40, 769 P.2d at 288 (stating that "promises cannot override the requirements of the disclosure law") (citation omitted). A number of attendees were off-duty police officers who were required by the city police chief to cooperate with the Liquor Board's investigation. *Id.* at 39, 769 P.2d at 287. The court distinguished this case from *Cowles Publishing Co. v. State Patrol*, 109 Wash. 2d 712, 748 P.2d 597 (1988), which disallowed the disclosure of names of police officers about whom complaints had been filed because their confidentiality is essential to effective law enforcement. *Spokane Police Guild*, 112 Wash. 2d at 37, 769 P.2d at 286. The *Spokane* court reasoned that only police internal investigations fall under the *Cowles* rule and that *Spokane* technically involved a Liquor Board, not a police, investigation. *Id.* at 39, 769 P.2d at 287.

65. 109 Wash. 2d 712, 748 P.2d 597.

66. *Id.* at 713, 748 P.2d at 598.

67. *Id.* at 714, 748 P.2d at 598.

68. *Id.* at 715, 748 P.2d at 599 ("The officer does not have the right to interrogate other witnesses, is not entitled to assert the privilege against self-incrimination, and is subject to dismissal upon refusal to respond.") (citation omitted).

69. *Id.* at 717, 748 P.2d at 600.

70. *Id.* at 717-18, 748 P.2d at 600.

persuaded the court that their internal system for responding to complaints of officer misconduct was a workable and effective procedure for ensuring that officers do not abuse their authority or engage in unlawful activities.<sup>71</sup>

## 2. *Case Law Prior to Newman Emphasized Excising Exempt Material and Disclosing the Rest*

If a requested record contains validly exempt information, agencies may not simply deny access to the entire record. Rather, an agency must excise exempt information and disclose the remainder. This parse and disclose requirement is statutorily grounded<sup>72</sup> and is consistent with the PDA's instruction to construe its substance broadly and construe its exemptions narrowly.<sup>73</sup>

Although very little information may be left after heavy redaction, the court still has required disclosure of any non-exempt information. In one case, *Progressive Animal Welfare Society v. University of Washington (PAWS)*, the Supreme Court of Washington held that although "much of the material at issue is covered by [the valuable formulae] exemption. . . . [T]hose portions which do not come within the exemption and which are not covered by any other exemption or other statute must be disclosed."<sup>74</sup> The *PAWS* case concerned the disclosure of a scientific grant proposal.<sup>75</sup> The court rejected University arguments that disclosure of *any* part of the grant might facilitate intellectual piracy and result in a loss of patent rights.<sup>76</sup>

Similarly, courts have required selective redaction and disclosure in cases involving multiple exemptions. For example, in *Dawson v. Daly*, the court considered whether a prosecutor's file on an adverse expert witness was exempt from disclosure under, inter alia, the discovery/work

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71. *Id.* at 729, 748 P.2d at 606.

72. See *supra* note 40 and accompanying text.

73. See *supra* note 33 and accompanying text.

74. 125 Wash. 2d 243, 255, 884 P.2d 592, 599 (1995) [*PAWS*]; see also *Brouillet v. Cowles Publ'g Co.*, 114 Wash. 2d 788, 790, 791 P.2d 526, 527 (1990) (ordering disclosure of records containing reasons for teacher certification revocations, subject to redaction of sexual misconduct victims' names and identifying details).

75. See *PAWS*, 125 Wash. 2d at 247, 884 P.2d at 595.

76. Russell K. Yoshinaka, Note, *Too Much of a Good Thing? Public Access to Medical Research in Washington After PAWS v. U.W.*, 70 Wash. L. Rev. 929, 946-47 (1995) (citing amicus brief).

product exemption.<sup>77</sup> The court remanded with instructions for an in camera determination of whether the documents fell under Washington's definition of work product. After separating the work product documents, the trial court was to examine whether any of the remaining documents were exempt under other PDA provisions, considering each potentially applicable exemption in turn.<sup>78</sup> *Dawson* and *PAWS* demonstrate the statutory and common law parse and disclose requirement.<sup>79</sup>

### III. *NEWMAN v. KING COUNTY*: THE MAJORITY AND THE DISSENT

#### A. *The Newman Majority*

The Supreme Court of Washington's decision in *Newman v. King County* is at odds with prior jurisprudence. The *Newman* court held that a requested murder file was exempt from disclosure in its entirety under the PDA's exemption for documents "essential to effective law enforcement."<sup>80</sup> The five-four majority<sup>81</sup> opinion reasoned that because the murder was unsolved and the police considered the file "open," the confidentiality of the file was essential to effective law enforcement.<sup>82</sup> The language in the majority opinion was not limited to unsolved murder files, but to all open files: "We hold RCW 42.17.310(1)(d) provides a

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77. 120 Wash. 2d 782, 788, 845 P.2d 995, 1000 (1993). A deputy prosecutor (Paul Stern) and a child protection specialist created files on an expert who frequently appears as a defense expert witness in child sex abuse prosecutions. The files contained articles and books by the witness, correspondence with third parties about the witness, and strategies and questions for cross-examination. The prosecutor's office compiled the file for impeachment purposes. *Id.* at 787, 845 P.2d at 998–99.

78. *See id.* at 788, 845 P.2d at 1000.

79. Recently, in *Limstrom v. Ladenburg*, the Supreme Court of Washington refused to exempt categorically from disclosure prosecutors' litigation files under the work product exemption. 963 P.2d 869, 872 (Wash. 1998) (citing Wash. Rev. Code § 42.17.310(1)(j)). Instead, the court required the prosecutor to identify and excise only those documents that were work product and to disclose the rest of the file. *Id.* at 878.

80. *Newman v. King County*, 133 Wash. 2d 565, 575, 947 P.2d 712, 716 (1997) (quoting Wash. Rev. Code § 42.17.310(1)(d)).

81. Justice Johnson wrote the majority opinion, which Justices Dolliver, Smith, Guy and Talmadge joined. Justice Alexander wrote a dissenting opinion, which Chief Justice Durham and Justices Madsen and Sanders joined.

82. *Newman*, 133 Wash. 2d at 575, 947 P.2d at 716.

broad categorical exemption from disclosure all information contained in an open active police investigation file . . . .”<sup>83</sup>

Because the issue in *Newman* was a matter of first impression in Washington, the majority drew upon federal case law interpreting FOIA for guidance.<sup>84</sup> It noted the U.S. Supreme Court statement that it is feasible to make a “generic determination” about what is essential for effective law enforcement.<sup>85</sup> *Newman* applied a Sixth Circuit test to determine whether an investigation is leading toward an enforcement proceeding. The test considers the following: “(1) affidavits by people with direct knowledge of and responsibility for the investigation . . . , (2) whether resources are allocated to the investigation, and (3) whether enforcement proceedings are contemplated.”<sup>86</sup>

Applying this test to the facts in *Newman*, the majority found it evident that disclosure was not required:

The County has shown they and the FBI have personnel assigned to the case. Evidence was presented by individuals responsible for the investigation who stated the case was still open and enforcement proceedings were contemplated. The evidence also establishes the documents requested cannot be disclosed because their release would impair the ability of law enforcement to share information and would inhibit the ability of police officers to determine, in their professional judgment, how and when information will be released.<sup>87</sup>

Police affidavits attesting that the Pratt file was open and the investigation was ongoing persuaded the majority that the file should be exempt from disclosure.

The majority noted that on previous occasions the court had stated that the PDA does not allow withholding entire records and that agencies must parse and disclose.<sup>88</sup> The majority declined to apply this proposition to the facts of the case at bar:

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83. *Id.* at 575, 947 P.2d at 717.

84. *Id.* at 572–73, 947 P.2d at 715–16.

85. *Id.* at 573, 947 P.2d at 716 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 223–24 (1978)); see also *supra* Part I.

86. *Newman*, 133 Wash. 2d at 573, 947 P.2d at 716 (quoting *Dickerson v. Department of Justice*, 992 F.2d 1426, 1431–32 (6th Cir. 1993)).

87. *Id.* at 574, 947 P.2d at 716.

88. *Id.* (quoting *Progressive Animal Welfare Soc’y v. University of Wash.*, 125 Wash. 2d 243, 261, 884 P.2d 592, 602 (1993)).

The statute does not define or establish any guidelines to limit the scope of exemption. . . . The ongoing nature of the investigation naturally provides no basis to decide what is important. Requiring a law enforcement agency to segregate documents before a case is solved could result in the disclosure of sensitive information. The determination of sensitive or non-sensitive documents often cannot be made until the case has been solved. This exemption allows the law enforcement agency, not the courts, to determine what information, if any, is essential to solve a case.<sup>89</sup>

The *Newman* court was convinced that it is difficult to determine the importance of a document in an ever-changing investigation.

### B. *The Newman Dissent*

The four dissenting justices in *Newman* would have affirmed the trial court's determination that a police file's open status does not trigger a categorical exemption, and that an in camera review is appropriate to determine whether any material is "essential to effective law enforcement."<sup>90</sup> The dissent criticized the majority's decision as (1) contravening the plain language of the PDA, (2) contradicting prior cases holding that the PDA does not authorize withholding of records in their entirety, (3) resting on federal authority that does not support its conclusion, and (4) constituting an improper delegation of judicial discretion to the law enforcement agency responsible for maintaining investigative records.<sup>91</sup>

First, the dissent attacked the majority for contravening the PDA's plain language. The dissent characterized the failure to construe the law enforcement exemption narrowly as *Newman*'s "primary flaw."<sup>92</sup> It emphasized that only "*specific*" intelligence information and "*specific*" investigative records are nondisclosable; and then only where it is "*essential* to effective law enforcement."<sup>93</sup> The dissent stated:

The PDA, in short, dictates that the decision regarding disclosure or nondisclosure of records or information is to turn on whether

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89. *Id.*

90. *Id.* at 576, 947 P.2d at 717 (Alexander, J., dissenting). Joining Justice Alexander were Chief Justice Durham and Justices Madsen and Sanders. *Id.* at 584, 947 P.2d at 721.

91. *Id.* at 575-76, 947 P.2d at 717 (Alexander, J., dissenting).

92. *Id.* at 577, 947 P.2d at 717 (Alexander, J., dissenting).

93. *Id.* (Alexander, J., dissenting) (emphasis added by dissenting opinion).



nondisclosure is either essential to effective law enforcement or to protect privacy rights, not on whether the records are contained in an open file.<sup>94</sup>

The dissent was also concerned about the reach of the majority's categorical exemption. Because there is no statute of limitations on murder, all unsolved murders are "theoretically open investigations," and an entire class of files is per se exempt from disclosure.<sup>95</sup>

Second, the dissent found the majority's treatment of *PAWS* contrary to *stare decisis*.<sup>96</sup> The result of the majority's decision that open files are categorically exempt is that the law enforcement agency—not the courts—will decide what is exempt and what may be disclosed. Such a transfer of power is exactly what the *PAWS* court refused to do: "leaving the interpretation and enforcement of the PDA's requirements to the very agencies it was designed to regulate is the 'most direct course to [the PDA's] devitalization.'"<sup>97</sup> Also important to the dissenting opinion was the *PAWS* court's refusal to recognize nondisclosure of *entire* records. Rather, agencies must parse and withhold only exempt portions.<sup>98</sup>

Third, the dissent distinguished the FOIA from the PDA. The dissent stated that under the FOIA, the exemption turns on the *status* of the case whereas under the PDA, the exemption "hinges on the *nature* of the record, that is, whether it is essential to effective law enforcement."<sup>99</sup> Moreover, the FOIA's standard for exemption is whether the documents could "reasonably be expected to interfere with enforcement proceedings," whereas the PDA standard looks to whether nondisclosure is "essential to effective law enforcement."<sup>100</sup> The FOIA does not contain a provision explicitly directing courts to construe its exemptions narrowly.<sup>101</sup> Thus, the dissent criticized the majority's reliance on federal

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94. *Id.* (Alexander, J., dissenting).

95. *Id.* at 578, 947 P.2d at 718 (Alexander, J., dissenting).

96. *Id.* at 579, 947 P.2d at 718–19 (Alexander, J., dissenting) ("The majority's holding . . . flies in the face of . . . *PAWS*.").

97. *Id.* (Alexander, J., dissenting) (quoting *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 131, 580 P.2d 246, 251 (1978)).

98. *Id.* at 579, 947 P.2d at 719 (Alexander, J., dissenting); see *supra* Part II.B.

99. *Newman*, 133 Wash. 2d at 581, 947 P.2d at 719 (Alexander, J., dissenting).

100. *Id.* (Alexander, J., dissenting) (quoting in part 5 U.S.C. § 552(b)(7)).

101. *Id.* (Alexander, J., dissenting). Compare this with the Washington provision at *supra* note 33 and accompanying text.

authority as inappropriate. Finally, the dissent disagreed with the majority's interpretation of *Robbins Tire*'s "generic determination."<sup>102</sup>

The dissent's final argument lamented the delegation of a judicial function to law enforcement agencies because it (1) is properly the responsibility of courts; (2) contravenes the PDA's mandate; and (3) results in self-policing, which leads to the downfall of the PDA.<sup>103</sup> In closing, the dissent viewed the *Newman* decision as a blow against the people's sovereignty "by granting the public agency that has maintained the Pratt murder file for almost 30 years an absolute veto right over the disclosure of any of its contents."<sup>104</sup>

#### IV. ANALYSIS

*Newman*'s categorical exemption ignores an extremely important requirement of the PDA—analysis of whether the nondisclosure of information is essential to effective law enforcement. Following *Newman*, if the police declare a file to be open, a court must mechanically declare the entire record exempt from disclosure regardless of its nature. Courts, rather than agencies, are the proper bodies to decide whether a document is exempt. *Newman*'s rule smacks of judicial legislation, as it lacks support in the language of the PDA. *Newman* also conflicts with prior case law that requires agencies to prove affirmatively that an exemption applies. *Newman*'s categorical exemption simply does not make sense as applied to a twenty-five year old file; the majority offers general rather than fact-specific reasons for the exemption of the Pratt file. This Note suggests that Washington courts adopt a case-by-case approach, requiring law enforcement agencies in every case to show why each narrowly defined category of documents in an open police file is exempt.

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102. *Newman*, 133 Wash. 2d at 581, 947 P.2d at 719 (Alexander, J., dissenting) (referring to *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978)); see *supra* note 85 and accompanying text. The *Newman* dissent read *Robbins Tire* to mean that although generic determinations of particular kinds of investigative files could be made, the federal courts must still determine whether a generic class of records should be disclosed. The inquiry turns on whether disclosure would interfere with enforcement proceedings. *Newman*, 133 Wash. 2d at 581, 947 P.2d at 720 (Alexander, J., dissenting); see also *supra* Part II.

103. *Newman*, 133 Wash. 2d at 582–83, 947 P.2d at 720–21 (Alexander, J., dissenting).

104. *Id.* at 583, 947 P.2d at 721 (Alexander, J., dissenting).

A. *Newman Contravenes the Policy of the PDA*

*Newman* violates the explicit policy of the PDA by keeping the citizenry *uninformed* about open police files with potentially great public interest. The PDA's purpose is to keep citizens informed so they have confidence in and control over their government.<sup>105</sup> The people, not agencies, are to decide what the public should and should not know.<sup>106</sup>

More importantly, *Newman* strips the court of its constitutional duty to decide disputes by allowing the police effectively to exempt themselves from the terms of the Act,<sup>107</sup> despite prior precedent that seriously questioned the propriety of agency review.<sup>108</sup> In *Newman*, the court belittled judicial reliance on a regulation promulgated by the withholding agency because an "agency is without authority to determine the scope of exemptions under the act."<sup>109</sup> Accordingly, it is difficult to comprehend why the police in *Newman* may retain the power of discretionary disclosure by declaring a file exempt from mandatory disclosure because it is open.<sup>110</sup> The democratic ideal of the PDA is clear, but the unfortunate result of *Newman* usurps this ideal by appointing the fox as the sole guard of the henhouse.

B. *The Majority Fails to Articulate Why the Confidentiality of Pratt's File Is Necessary for Effective Law Enforcement*

The *Newman* court seems intent on fashioning a rule for future cases instead of one for the facts at hand. The majority's broad statement of the issue sets it up for a broad holding: "whether information within an open police investigation can be withheld from disclosure under RCW 42.17.310(1)(d) because the nondisclosure of the information is essential to effective law enforcement."<sup>111</sup> A more appropriate statement of the issue might have been "whether the designation of a police file as open

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105. See *supra* notes 28, 32 and accompanying text.

106. See *supra* note 32 and accompanying text.

107. See *supra* notes 37, 103 and accompanying text; see also Wash. Const. art. IV, § 1; State *ex rel.* Campbell v. Superior Court, 25 Wash. 271, 65 P. 183 (1901) (stating that judicial function is to declare and construe law).

108. Brouillet v. Cowles Publ'g Co., 114 Wash. 2d 788, 794, 791 P.2d 526, 529 (1990).

109. *Id.* (citation omitted).

110. See *supra* text accompanying note 89 ("This exemption allows the law enforcement agency, not the courts, to determine what information, if any, is essential to solve a case.").

111. *Newman v. King County*, 133 Wash. 2d 565, 567, 947 P.2d 712, 713 (1997).

necessarily makes its confidentiality essential for effective law enforcement, protecting the file from disclosure under the PDA.”

The majority provided few concrete reasons why the confidentiality of the Pratt murder file is essential for effective law enforcement. The reasons it gave were neither well-explained nor well-defined. For example, the majority was persuaded by the agency’s argument that it could not release the file because that would preclude a decision on how and when to disclose information.<sup>112</sup> This circular and unconvincing argument demonstrates the danger of leaving the interpretation of the PDA to those it regulates.<sup>113</sup>

The arguments given for exemption in *Newman* are general to all open files instead of specific to the Pratt file. The court’s “general” analysis fails to meet the standard of the PDA in prior Washington cases that provided for detailed, articulable reasons for exemptions. For example, because twenty-five years had passed since the crime occurred, a mere assertion by the agency that enforcement proceedings are “contemplated” is unpersuasive.<sup>114</sup>

A fear of disruption of police investigations colors the majority opinion. However, adoption of a case-by-case approach could give due consideration to police affidavits. Such an approach could also consider the time elapsed since the crime occurred in order to protect information pertaining to recent crimes. The passing of time should not be the determining factor, but merely a factor speaking to the credibility of police statements that the investigation is active. The recent trial of Sam Bowers, Jr. and the reinvestigation of the Martin Luther King, Jr. assassination demonstrate that the police investigations of civil rights-era murder cases can produce results. The PDA should not interfere with good faith police work, but *Newman*’s protection is excessive. The court should adopt a less severe test that would achieve a balance between the need for confidentiality and the right of access to public information.

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112. See *supra* note 87 and accompanying text.

113. See *supra* note 52 and accompanying text; see also *supra* notes 109–10 and accompanying text.

114. Compare *Newman*, 133 Wash. 2d at 574, 947 P.2d at 716 (generalizing that ongoing investigation does not give court basis to decide what is important information), with *Ashley v. Washington State Pub. Disclosure Comm’n*, 16 Wash. App. 830, 836, 560 P.2d 1156, 1159 (1977) (listing reasons why four month old investigative record is exempt from disclosure).

### C. *Newman Is Inconsistent with Washington Law*

#### 1. *Newman Violates the Plain Language of the PDA*

The *Newman* majority ignores the plain language of the PDA law enforcement provision. A categorical exemption precludes an inquiry into whether the “nondisclosure is essential to effective law enforcement.” A holding more consistent with the statute is that open police files can be withheld from disclosure under the law enforcement exemption only if the agency demonstrates that nondisclosure of the information is essential to effective law enforcement.<sup>115</sup>

As the dissent observes, the majority also ignores the plain language of the Act’s interpretation instructions.<sup>116</sup> Three times the Act orders exemptions to be narrowly construed;<sup>117</sup> yet, the majority manages to read the language of the law enforcement provision to “provide for a categorical exemption for all records and information in these files.”<sup>118</sup> The majority claims it cannot follow the Act’s rule of narrow construction because the law enforcement exemption is written so broadly.<sup>119</sup> However, this claim ignores the limit specified in the statute, namely the test of whether the information’s secrecy is “essential” to law enforcement.<sup>120</sup>

The majority’s interpretation of the law enforcement exemption renders the term “essential” meaningless, thus violating the rule of statutory construction that courts interpret statutes so as to make no language superfluous.<sup>121</sup> The PDA also provides that only “specific” records and files may be withheld.<sup>122</sup> The word “specific” weighs against any generic exemption of all records. The word may also contemplate case-by-case decisions instead of the federal category-by-category approach.<sup>123</sup> The *Newman* holding blatantly ignores the legislative demand for fact-specific analysis by ruling that all open police files are exempt from disclosure.

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115. Wash. Rev. Code § 42.17.310(1)(d) (1998).

116. See *supra* note 92 and accompanying text.

117. See *supra* note 33 and accompanying text.

118. See *Newman*, 133 Wash. 2d at 575, 947 P.2d at 717.

119. See *supra* note 89 and accompanying text.

120. See *supra* note 35 and accompanying text.

121. *Fray v. Spokane County*, 134 Wash. 2d 637, 648, 952 P.2d 601, 606 (1998).

122. See *supra* note 35 and accompanying text.

123. See *supra* notes 21–23 and accompanying text; *infra* note 150 and accompanying text.

## 2. Newman Is Inconsistent with Washington Case Law

After *Newman*, law enforcement agencies are neither required to parse and disclose open files nor to articulate reasons for withholding such a file. This has no basis in prior PDA case law, namely *Progressive Animal Welfare Society v. University of Washington's (PAWS)* parse and disclose requirement.<sup>124</sup> PAWS specifically rejected the notion of records being withheld in their entirety.

Furthermore, prior PDA case law demanded significant proof from the agency asserting the exemption. *PAWS* and *Spokane Police Guild v. Cowles Publishing Co.* show how the court narrowly construed PDA exemptions and rejected plausible agency arguments.<sup>125</sup> Another case, *Cowles Publishing Co. v. State*, was properly decided in favor of the agency only after a compelling argument by the agency.<sup>126</sup> The *Newman* majority did not articulate how nondisclosure of the Pratt file would actually reflect the purpose behind the law enforcement exemption. It merely stated in a circular manner that enforcement proceedings were contemplated and that release would impair the ability of law enforcement to share information.<sup>127</sup>

The Supreme Court of Washington recently retreated from the *Newman* approach in *Limstrom v. Ladenburg*, holding that prosecutors' criminal litigation files are not categorically exempt from disclosure, as the prosecutor argued.<sup>128</sup> Instead, the court ordered the prosecutor to disclose portions of the file that did not fall within the protections of the work product rule and to identify the documents the prosecutor claimed were work product and therefore exempt.<sup>129</sup> *Limstrom* reinforces that *Newman* was an erroneously-decided, maverick decision.

In contrast, federal cases cite reasons such as: (1) the need for confidentiality of witness informants' statements;<sup>130</sup> (2) the instrumentality of documents to proceedings anticipated in the near future;<sup>131</sup>

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124. See *supra* notes 96–98 and accompanying text.

125. See *supra* Part II.B.

126. See *supra* Part II.B.1.b.

127. *Newman v. King County*, 133 Wash. 2d 565, 574, 947 P.2d 712, 716 (1997).

128. No. 65351-8, 1998 WL 675888, at \*1 (Wash. Oct. 1, 1998).

129. *Id.* at \*9.

130. *Manna v. Department of Justice*, 51 F.3d 1158, 1162 (3d Cir. 1995) (involving organized crime/RICO case within Genovese La Cosa Nostra crime family).

131. *Id.*

(3) the tendency of the release to intimidate witnesses to change testimony;<sup>132</sup> (4) the difficulty in verifying and corroborating future witnesses' statements, especially in homicide cases, after public release of file;<sup>133</sup> and (5) the need for confidentiality of reports on location and viability of potential evidence.<sup>134</sup> These reasons convincingly show why secrecy of the information is important.

The Supreme Court of Washington is, of course, free to revise its interpretation of state law under the constraints of *stare decisis*. The law would be clearer and more instructive, however, if a drastic change were explicitly stated and explained. Although *Newman* changed the law, it did so implicitly and did not explain its reasoning.

#### *D. Other Jurisdictions Do Not Automatically Exempt Open Police Files*

##### *1. Federal Law*

Even the FOIA, to which the majority turned for guidance, does not allow blanket exemptions. Compared to Washington law after *Newman*, the FOIA places a greater burden on the agency to prove, category-of-document by category-of-document,<sup>135</sup> that information falls within the scope of the exemption. The federal statute is worded more broadly than the PDA, making exemption easier. Nevertheless, federal courts require the agency to demonstrate that the law enforcement exemption applies.

Overall, federal courts have a better and more considered approach than the *Newman* court. The U.S. Supreme Court and Congress have disapproved of any "wooden and mechanical" approach to the FOIA law enforcement exemption.<sup>136</sup> In a 1974 amendment, Congress legislatively overruled prior cases applying a blanket exemption.<sup>137</sup> One of those cases involved a request for President Kennedy's assassination file, which was denied.<sup>138</sup> Modern federal cases look to Exemption 7(A)'s legislative

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132. *Dickerson v. Department of Justice*, 992 F.2d 1426, 1433 (6th Cir. 1993).

133. *Id.*

134. *Bevis v. Department of State*, 801 F.2d 1386, 1390 (D.C. Cir. 1986) (involving 1981 murder of Americans in El Salvador).

135. See *supra* notes 21–25 and accompanying text.

136. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224–36 (1978).

137. *Id.* at 221–22.

138. *Weisberg v. Department of Justice*, 489 F.2d 1195, 1196–97 (1973).

history, holding that a record that is investigatory in nature is neither automatically nor endlessly exempt.<sup>139</sup>

From the Court's statement that a "generic determination" of likely interference could be made, federal appellate courts have adopted the category-of-document by category-of-document approach.<sup>140</sup> Relevant categories are important because they allow the reviewing court to discern how the release of a category of documents will interfere with law enforcement proceedings.<sup>141</sup> The majority in *Newman* misconstrued the phrase "generic determination" as supporting a rule that all open police files are exempt.<sup>142</sup>

Washington case law under the PDA has cautioned that "despite the close parallel between the state act and the FOIA, the state act is more severe than the federal act in many areas."<sup>143</sup> In light of this, the conservative *Newman* decision is ironic. The federal act is a weaker mandate for disclosure than the PDA; yet, federal case law imposes a greater burden than *Newman* on the agency claiming the law enforcement exemption.

## 2. Other States

The Washington disclosure act is considered a more liberal disclosure act and its "essential" test is unique among the public disclosure laws of other states.<sup>144</sup> For example, Washington is one of only seven states with

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139. *Robbins Tire*, 437 U.S. at 227–28, 230 (quoting Senator Kennedy's remarks). The Court further explained recent congressional amendments to Exemption 7(A) as indicating that "with the passage of time . . . when the investigation is all over and the purpose and point of it has expired, it would no longer be an interference with enforcement proceedings and there ought to be disclosure." *Id.* at 232 (quoting Senate proceedings).

140. See *supra* notes 17–25 and accompanying text.

141. See *supra* note 22 and accompanying text.

142. See *supra* note 102 and accompanying text.

143. *Amren v. City of Kalama*, 131 Wash. 2d 25, 35, 929 P.2d 389, 394 (1997) (deciding that with PDA, unlike with FOIA, attorney fees may be awarded to successful party without showing of agency's bad faith denial); *Progressive Animal Welfare Soc'y v. University of Wash.*, 125 Wash. 2d 243, 266, 884 P.2d 592, 605 (1994) (holding that FOIA's disclosure exemption for grant proposals applies only to federal agencies and that PDA generally compels state agencies to disclose grant proposals); *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 129, 580 P.2d 246, 250 (1978) (noting that despite close parallel between state statute and FOIA, Washington law is more severe than federal Act in certain respects).

144. Commentators have classified Washington as a liberal disclosure state based on the scope of the definition of agency records; the broader the definition of agency records, the more information available to a requester. See, e.g., Dr. Michael D. Akers et al., *Federal and State Open Records*



mandatory awards for attorney fees for open records act violations.<sup>145</sup> In contrast, California and Texas have a more conservative approach to the investigatory record exemption. In those states, open and closed files are exempt from disclosure.<sup>146</sup> This approach is not applicable to Washington law, which favors broader disclosure.

Unlike Washington, some states have a law enforcement exemption that predicates disclosure upon whether the underlying investigation is "active."<sup>147</sup> Some of these states, however, guard against police abuse of the investigatory exemption by statutorily defining "active." For example, Florida requires a "reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future."<sup>148</sup> Defining "active" in this way avoids giving the agency discretion to declare a record exempt.

Even Massachusetts, the state with a law enforcement exemption most similar to Washington's, requires fact-specific analysis. Massachusetts law exempts investigatory materials if disclosure "would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest."<sup>149</sup> Massachusetts courts read this language to be applied on a "case-by-case basis," and refused to imply any blanket exemptions for police records.<sup>150</sup> Furthermore, the Supreme Court of Massachusetts underscored that the police must point

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*Laws: Their Effects on the Internal Auditors of Colleges and Universities*, 3 Marq. Sports L.J. 161, app. at 184 (1993); Burt A. Braverman & Wesley R. Heppler, *A Practical Review of State Open Records Laws*, 49 Geo. Wash. L. Rev. 720, 734 (1981); Comment, *Public Inspection of State and Municipal Executive Documents*, 45 Fordham L. Rev. 1105, 1119 (1977).

145. *Sanctions Give Records Laws Teeth*, News Media & L., Spring 1992, at 27, 28. A majority of states award attorney fees upon court discretion. *Id.* at 28.

146. *Williams v. Superior Court*, 852 P.2d 377, 393 (Cal. 1993) (mandating perpetual exemption under investigatory record exemption and refusing to imply FOIA's law enforcement criteria); *Holmes v. Morales*, 924 S.W.2d 920, 921 (Tex. 1996) (holding closed files categorically exempt under criminal investigation/prosecution exemption and refusing to imply FOIA's "interference with law enforcement" test). The Texas approach is not surprising considering the state's pro-law enforcement history. See Américo Paredes, *With His Pistol in His Hand* 23-32 (1958) (noting exploits of Texas Rangers).

147. See, e.g., Fla. Stat. Ann. § 119.07(3)(b) (West 1996); Ga. Code Ann. § 50-18-72(a)(3) (1994); Ky. Rev. Stat. Ann. § 61.878(1)(h) (Banks-Baldwin 1994); La. Rev. Stat. Ann. § 44:3A:(1, 3) (West 1982); Minn. Stat. Ann. § 13.82, subd.5 (West 1997); N.D. Cent. Code § 44-04-18.7 (Supp. 1997).

148. Fla. Stat. Ann. § 119.011(6)(d)(2) (West 1996); see also N.D. Cent. Code § 44-04-18.7(3).

149. Mass. Ann. Laws ch. 4, § 7 cl. Twenty-sixth (f) (Law. Co-op. 1988).

150. *Globe Newspaper Co. v. Police Comm'r*, 648 N.E.2d 419, 425 (Mass. 1995) (ordering disclosure of substantial part of internal police investigation).

to specific reasons in order to carry their statutory burden for nondisclosure.<sup>151</sup>

Two state courts have specifically refused to categorically exempt open police files. In *Milwaukee Journal v. Call*,<sup>152</sup> the Wisconsin Court of Appeals considered whether documents in an unsolved murder investigation were exempt from disclosure.<sup>153</sup> Rather than automatically holding an unsolved murder file exempt, the court remanded with instructions for the trial court to balance the public interest in secrecy against the public interest in openness.<sup>154</sup> Significantly, *Milwaukee Journal* was decided merely two years after the murder occurred. In *Cox Arizona Publications v. Collins*, the court would not permit a sweeping exemption for active ongoing criminal investigations under the Arizona Public Records Law.<sup>155</sup> The court announced that such a blanket rule would contravene the "strong policy favoring open disclosure and access . . . . The legislature has not carved out such a broad exemption, nor do we."<sup>156</sup> These two cases show that open police files need not be categorically exempt from disclosure; the court, not the agency, should decide if nondisclosure is appropriate.

#### E. *The Newman Rule Does Not Fit the Facts*

A categorical exemption simply does not make sense when the facts in *Newman* are considered. The facts of Pratt<sup>157</sup> and the highly political and

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151. See *id.* at 424 (stating agency has burden of proving "with specificity" record is exempt); *WBZ-TV4 v. District Attorney*, 562 N.E.2d 817, 822 (Mass. 1990) (considering and weighing carefully counsels' arguments and emphasizing that decision for nondisclosure is specific to circumstances); *Bougas v. Chief of Police*, 354 N.E.2d 872, 878 (Mass. 1976) (stating police must come forward with "specific proof" when claiming exemption). Many other states require specificity as well. See, e.g., *Freeman v. Guaranty Broad. Corp.*, 498 So. 2d 281, 224 (La. App. 1986) (stating that applicability of exemption for "active intelligence information" is determined on item-by-item examination subject to judicial review).

152. 450 N.W.2d 515 (Wis. Ct. App. 1986).

153. *Id.* at 516.

154. *Id.* at 518.

155. 852 P.2d 1194, 1198 (Ariz. 1993).

156. *Id.*

157. Eyewitnesses told police of two youths running from the scene and jumping into a running car the day of the murder. *Pratt, Urban League Director*, *supra* note 2, at A. Within two days, a \$10,000 reward had been offered by Seattle's business community for information leading to the arrest of the Pratt assassins. Larry McCarten, *Rewards Offered in Pratt Slayings*, *Seattle Post-Intelligencer*, Jan. 28, 1969, at A. The King County sheriff had immediately determined that assassination, not burglary or robbery, was the likely motive of the murder. *Id.* Four days after the

tense race situation of the era create a possibility of police cover-up or other wrongdoing. If this were the case, the police would naturally have an interest in keeping the file secret, but the public interest in disclosure and justice should prevail. The importance of public knowledge is not just persuasive policy, but authoritative law because it is written into the PDA.<sup>158</sup>

It is important that the information seeker in *Newman* was a journalist.<sup>159</sup> Newspapers are designed to disseminate information to the public, especially information that reveals flaws in the workings of government.<sup>160</sup> Access to public records has been called newspapers' "most vital raw material source."<sup>161</sup> Reporters covering police beats have used public records to write stories that prompt change,<sup>162</sup> resulting in better police forces and more efficient and equitable enforcement of the laws.<sup>163</sup> The *Newman* decision sent ominous reverberations through the major media in Washington.<sup>164</sup>

Besides the unique circumstances of the Pratt murder, the Department's handling of the 1994 request supports a finding that an exemption from the PDA was actually *not* essential. After denying Newman's request, the Department, upon reconsideration (and prompting from the King County executive's office) decided it could release more information from the file after all.<sup>165</sup> This see-sawing

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murder, the local paper ran a front page drawing and description of the getaway car, inviting informants to go to the police. *Have You Seen This Car?*, Seattle Post-Intelligencer, Jan. 30, 1969, at A.

158. See *supra* note 32 and accompanying text.

159. *Newman v. King County*, 133 Wash. 2d 565, 568, 947 P.2d 712, 713 (1997).

160. In his concurring opinion in *New York Times Co. v. United States*, Justice Black emphatically stated that "[t]he press was protected [by the Founding Fathers in the First Amendment] so that it could bare the secrets of government and inform the people. In revealing the workings of government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders hoped and trusted they would do." *Id.* at 769 (Black, J., concurring) (citations omitted).

161. Harold L. Cross, *The People's Right to Know* 4 (1953).

162. *Police Records: A Guide to Effective Access in the 50 States & D.C.*, News Media & L., Summer 1997, at 1, 2 (documenting reform triggering effect of newspaper story on police's differential treatment of Oakland rape victims versus Berkeley rape victims).

163. *Id.*

164. Telephone interview with Ken Bunting, Managing Editor, Seattle Post-Intelligencer (June 2, 1998).

165. See *supra* note 6.

suggests that the confidentiality of much of the information in this particular file was not essential to law enforcement.<sup>166</sup>

## V. A PROPOSED RULE

Washington courts should approach each PDA request on a case-by-case basis, following the federal and Massachusetts courts. An application of the law to the facts in *Newman* should have resulted in an affirmation of the trial court's decision to inspect the twenty-six year old file in camera. A workable rule would require the agency to demonstrate affirmatively why specific information would actually hinder an active investigation and why nondisclosure is "essential."

The court should balance several factors to determine whether the nondisclosure of investigatory files is essential for effective law enforcement. Whether a file is closed or open is an important factor; affidavits of law enforcement officers attesting to the ongoing nature of an investigation should be entitled to some deference. If a file is open, a court should inquire whether there is a reasonable, good faith anticipation of securing an arrest in the foreseeable future. The secrecy often required for open police files should not be discounted. The passage of time should also be considered in deciding whether confidentiality is essential. The time factor overlaps with the determination of whether the police anticipate an arrest in the future. Other factors include whether confidential investigative techniques and sources are disclosed, and whether disclosure would stymie police officers' candor in recording observations and interim conclusions in the file.<sup>167</sup>

Overriding this multi-factor test should be the requirement that the agency shoulder the entire burden of proving that nondisclosure is warranted. To do this, the agency must point to specific reasons why nondisclosure of the particular record at hand is essential for effective law enforcement. General claims of broad state interest should not be persuasive.<sup>168</sup> Because Washington courts interpreting the PDA have

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166. See *Spokane Police Guild v. Washington State Liquor Control Bd.*, 112 Wash. 2d 30, 37, 769 P.2d 283, 286 (1989) (holding as unconvincing law enforcement agency's assertion that records were essential to effective law enforcement just because another law enforcement agency voluntarily turned over some records).

167. See *Globe Newspaper Co. v. Police Comm'r*, 648 N.E.2d 419, 425 (Mass. 1995).

168. Disfavored general reasons are that disclosure would jeopardize fair trials for defendants, hamper ongoing investigations, burden agencies unreasonably, inhibit future witnesses from

looked to federal law for guidance, it is reasonable for Washington to follow the federal requirement of specificity. Pursuant to the federal category-of-document by category-of-document approach, a Washington law enforcement agency should not be able merely to assert that an entire record is exempt, but should show the court why the documents within the record are exempt. Furthermore, Washington should approach disclosure requests on a case-by-case basis. The language of the PDA contemplates no less.

## VI. CONCLUSION

The *Newman* decision works an injustice to the Public Disclosure Act's policy of broad disclosure. The Supreme Court of Washington, confronted with a request for police disclosure of a twenty-five year old unsolved murder, created a sweeping categorical exemption from disclosure for all open investigative files. Unlike the federal courts' approach to similar requests under the FOIA, in Washington under *Newman*, a court reviewing an agency's denial of access to information under the law enforcement exemption to the PDA need only engage in one inquiry: Is the status of the file, according to the agency, open or closed? No further analysis is necessary if officers submit affidavits stating the file is open. This outcome is contrary to the language of the statute, prior Washington case law, and does not fit the facts of *Newman*. In order to balance properly the public's right to know with the interest in nondisclosure, courts should be allowed to inquire of the agency *why* the file's confidentiality is essential to effective law enforcement.

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speaking with police, and impair privacy. See *Cox Ariz. Publications, Inc. v. Collins*, 852 P.2d 1194, 1197 (Ariz. 1993).